

1 **Timothy J. Conway**, OSB No. 851752 (Lead Attorney)

Direct Dial: (503) 802-2027

2 Facsimile: (503) 972-3727

E-Mail: tim.conway@tonkon.com

3 **Ava L. Schoen**, OSB No. 044072

Direct Dial: (503) 802-2143

4 Facsimile: (503) 972-3843

E-Mail: ava.schoen@tonkon.com

5 **Sarah M. Einowski**, OSB No. 093412

Direct Dial: (503) 802-5738

6 Facsimile: (503) 274-8779

E-Mail: sarah.einowski@tonkon.com

7 **TONKON TORP LLP**

1600 Pioneer Tower

8 888 S.W. Fifth Avenue

Portland, OR 97204

9 Attorneys for Debtor

11 UNITED STATES BANKRUPTCY COURT

12 DISTRICT OF OREGON

13 In re

Case No. 16-32311-pcm11

14 Peak Web LLC,

15 Debtor.

16 Peak Web LLC,

Adv. Pro. No. 16-03075-pcm

17 Plaintiff,

18 v.

**PLAINTIFF'S MOTION TO STRIKE
BANC OF AMERICA LEASING &
CAPITAL, LLC'S PLEADINGS IN
OPPOSITION TO PRELIMINARY
INJUNCTION AND MOTION IN
LIMINE**

19 Winthrop Resources Corporation, a Minnesota
20 corporation; Hitachi Capital America Corp., a
Delaware corporation,

21 Defendants.

22 Debtor and Plaintiff Peak Web LLC moves this Court for an Order to Strike

23 Banc of America Leasing & Capital, LLC's pleadings, ECF Nos. 22, 22-2, 22-3, 23, and 40.

24 * * *

1 This Motion is supported by the accompanying Memorandum of Law and the pleadings on
2 file.

3 DATED this 1st day of August, 2016.

4 TONKON TORP LLP

5
6 By /s/ Ava L. Schoen

7 Timothy J. Conway, OSB No. 851752

8 Ava L. Schoen, OSB No. 044072

9 Sarah M. Einowski, OSB No. 093412

Attorneys for Peak Web LLC

038470/00001/7420120v1

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MOTION TO STRIKE BANC OF AMERICA LEASING & CAPITAL, LLC'S PLEADINGS IN OPPOSITION TO PRELIMINARY INJUNCTION AND MOTION IN LIMINE** was served on the parties indicated as "ECF" on the attached List of Interested Parties by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below.

In addition, the parties indicated as "Non-ECF" on the attached List of Interested Parties were served by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

DATED this 1st day of August, 2016.

TONKON TORP LLP

By /s/ Ava L. Schoen

Timothy J. Conway, OSB No. 851752
Ava L. Schoen, OSB No. 044072
Sarah M. Einowski, OSB 093412
Attorneys for Peak Web LLC

LIST OF INTERESTED PARTIES

Peak Web LLC v. Winthrop Resources Corporation and Hitachi Capital America Corp.
Adversary Proceeding No. 3:16-ap-3075

In re Peak Web LLC.
U.S. Bankruptcy Court Case No. 16-32311-pcm11

ECF PARTICIPANTS

- TIMOTHY J CONWAY tim.conway@tonkon.com,
nancy.kennedy@tonkon.com;spencer.fisher@tonkon.com;leslie.hurd@tonkon.com
- CONDE T COX conde@lawofficeofcondecocox.com, trishbowcock@comcast.net
- OREN B HAKER obhaker@stoel.com, docketclerk@stoel.com;lacey.gillet@stoel.com
- MARY JO HESTON hestonm@lanepowell.com, campbelld@lanepowell.com;docketing-
sea@lanepowell.com;barkerd@lanepowell.com
- CODY HOESLY choesly@lvklaw.com,
nsmith@lvklaw.com;docket@lvklaw.com;wlarkins@lvklaw.com;baplegate@lvklaw.com;mhughes@lvklaw.com
- WILLIAM L LARKINS wlarkins@larkinsvacura.com, nsmith@larkinsvacura.com;docket@larkinsvacura.com
- AVA L SCHOEN ava.schoen@tonkon.com, nancy.kennedy@tonkon.com;candace.duncan@tonkon.com
- MARK A. SERLIN mserlin@globelaw.com, msaetern@globelaw.com;kwhiteford@globelaw.com
- SKYLER M TANNER tanners@lanepowell.com, beldingt@lanepowell.com;docketing-
pdx@lanepowell.com;barkerd@lanepowell.com

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12 DISTRICT OF OREGON

13 In re

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14 Peak Web LLC,

15 Debtor.

16 Peak Web LLC,

Adv. Pro. No. 16-03075-pcm

17 Plaintiff,

18 v.

19 Winthrop Resources Corporation, a Minnesota
20 corporation; Hitachi Capital America Corp., a
Delaware corporation,

21 Defendants.

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO STRIKE
BANC OF AMERICA LEASING &
CAPITAL, LLC'S PLEADINGS IN
OPPOSITION TO PRELIMINARY
INJUNCTION AND MOTION IN
LIMINE**

24 **I. INTRODUCTION**

25 Debtor and Plaintiff Peak Web LLC ("Debtor") initiated this adversary
26 proceeding to enjoin two creditors—Winthrop Resources Corporation ("Winthrop") and

1 Hitachi Capital America Corp. ("Hitachi") (collectively "Defendants")—from continuing to
2 litigate against Debtor's CEO before the Chapter 11 plan is confirmed. Banc of America
3 Leasing & Capital, LLC ("BALC") is not a party to the lawsuit Winthrop filed in Minnesota
4 state court, is not a party to this adversary proceeding, and has not sought to intervene in this
5 adversary proceeding. Nonetheless, BALC has filed five pleadings in opposition to Debtor's
6 request: (1) Opposition to Motion for Preliminary Injunction [ECF No. 22]; (2) Declaration
7 of Kevin P. Whiteford in Opposition to Debtor Peak Web LLC's Motion for Preliminary
8 Injunction [ECF No. 22-1]; (3) Request for Judicial Notice in Support of Opposition to
9 Motion for Preliminary Injunction [ECF No. 22-2]; (4) Exhibit List of Banc of America
10 Leasing & Capital, LLC [ECF No. 23]; and (5) Motion in Limine of Banc of America
11 Leasing & Capital LLC [ECF No. 40]. BALC has no standing to appear in this matter or file
12 such pleadings. Accordingly, this Court should strike BALC's pleadings. To the extent the
13 Court does not strike the pleadings, by separate motion, Debtor has filed its opposition to
14 BALC's Motion in Limine, seeking to have that motion denied.

15 **II. ARGUMENT**

16 BALC has no standing to appear as a party in this adversary proceeding.
17 BALC has not yet sued Mr. Papen on any alleged personal guarantee. The Minnesota
18 lawsuit was only filed by Winthrop Resources Corporation. *See* Debtor's Exhibit 33. BALC
19 is not a defendant in this adversary proceeding.¹ The fact that the same attorney, until
20 recently, represented both Winthrop and BALC does not somehow make BALC a party to
21 this proceeding. [*See* ECF Nos. 21, 24.] If BALC wanted to be a party to this case, it should
22

23 ¹ It is disingenuous for BALC to file multiple pleadings in this adversary pleading as if it
24 were a party to this Adversary Proceeding (which it is not) while simultaneously seeking to
25 exclude evidence related to guarantees to creditors who are not defendants in this action
26 because "third parties who are not defendants in this action have no bearing on the merits on
the injunctive relief sought." Debtor agrees that third party creditors and their demands on
Mr. Papen are relevant, but only those third parties that have joined this adversary proceeding
should be allowed to participate as parties.

1 have moved to intervene in the adversary proceeding pursuant to FRCP 24. It did not do so.

2 **III. CONCLUSION**

3 BALC is not a party to this adversary proceeding. Since BALC is not a party
4 it has no standing to file pleadings. This Court should strike ECF Nos. 22, 22-1, 22-2, 23,
5 and 40.

6 DATED this 1st day of August, 2016.

7 TONKON TORP LLP

8
9 By /s/ Ava L. Schoen

10 Timothy J. Conway, OSB No. 851752

11 Ava L. Schoen, OSB No. 044072

12 Sarah M. Einowski, OSB No. 093412

13 Attorneys for Peak Web LLC

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nancy.kennedy@tonkon.com;spencer.fisher@tonkon.com;leslie.hurd@tonkon.com
- CONDE T COX conde@lawofficeofcondecocox.com, trishbowcock@comcast.net
- OREN B HAKER obhaker@stoel.com, docketclerk@stoel.com;lacey.gillet@stoel.com
- MARY JO HESTON hestonm@lanepowell.com, campbelld@lanepowell.com;docketing-
sea@lanepowell.com;barkerd@lanepowell.com
- CODY HOESLY choesly@lvklaw.com,
nsmith@lvklaw.com;docket@lvklaw.com;wlarkins@lvklaw.com;baplegate@lvklaw.com;mhughes@lvklaw.com
- WILLIAM L LARKINS wlarkins@larkinsvacura.com, nsmith@larkinsvacura.com;docket@larkinsvacura.com
- AVA L SCHOEN ava.schoen@tonkon.com, nancy.kennedy@tonkon.com;candace.duncan@tonkon.com
- MARK A. SERLIN mserlin@globelaw.com, msaetern@globelaw.com;kwhiteford@globelaw.com
- SKYLER M TANNER tanners@lanepowell.com, beldingt@lanepowell.com;docketing-
pdx@lanepowell.com;barkerd@lanepowell.com